APPEAL NO. 991867

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 10, 1999, a contested case hearing (CCH) was commenced, with a second session held on July 15, 1999. The issue at the CCH was the extent of injury. The hearing officer determined that the appellant's (claimant herein) compensable injury did not extend to his clinical depression or to his cervical spine. The claimant files a request for review, arguing that the hearing officer's determination was contrary to the evidence. The respondent (carrier) replies that the decision of the hearing officer was supported by the evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

It was undisputed that the claimant suffered a compensable injury on _____. The claimant testified that this injury took place while he was lifting a 30-pound box at work, injuring his back, neck, and shoulder. The claimant testified that the injury had resulted in depression. The claimant put into evidence an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated February 12, 1996, in which he listed the parts of his body injured as his neck, shoulder, and lower back. The claimant initially treated with Dr. A, D.C., who reported that the claimant gave a history of pain in the neck, shoulder, and back with pain radiating into the left buttock, the back of the left upper leg and the back of the left knee. Dr. A's initial working diagnosis was cervical radiculitis, lumbar disc syndrome, and thoracic segmental dysfunction.

The claimant filed an Employee's Request to Change Treating Doctors (TWCC-53) dated July 31, 1996, in which he requested to change treating doctors from Dr. A to Dr. W, M.D. In the TWCC-53, the claimant gave the following reason for requesting this change:

> I do not think [Dr. A] is treating me with the best of his ability or interest. I believe [Dr. W] will evaluate and access [sic] the whole of my neck, shoulder & lower back instead of just my back.

This request to change treating doctors was granted and the claimant began treating with Dr. W. In addition to treating the claimant's neck, shoulder, and back, Dr. W referred the claimant to Dr. Wi, M.D., a pain management specialist, who in November 1996 performed epidural injections and diagnosed that the claimant was suffering from depression. The claimant was examined by Dr. O, who initially found that the claimant was not at maximum medical improvement and later rated his permanent impairment from the injury at 12% in a May 7, 1997, report.

The claimant testified that he was involved in a motor vehicle accident in November 1996. He testified that while this accident temporarily increased the pain in his neck, the

effects of this accident resolved and what remained was the same neck pain he had suffered off and on since the _____, injury. A cervical MRI was performed on the claimant on November 25, 1998, which showed a herniated disc at C3-4.

The claimant was referred in December 1998 to Dr. M, M.D., a psychiatrist, for treatment of his depression. Dr. M stated in a letter of February 15, 1999, that the claimant developed depression as a result of his _____, injury. In a March 29, 1999, letter, Dr. W stated that both the claimant's depression and cervical condition were directly related to his _____, injury. Dr. G, M.D., reviewed the claimant's medical records at the carrier's request and in a report dated March 8, 1999, opined that the claimant did not suffer an injury on _____, and therefore any psychiatric problems the claimant had could not be related to any such injury.

At the first session of the CCH, the hearing officer suggested and the parties agreed that the hearing officer would choose a doctor who would perform an additional evaluation of the claimant. The hearing officer chose Dr. B, M.D., a psychiatrist and medical utilization specialist, who issued a report on June 3, 1999, addressing the question of whether psychiatric treatment was reasonable, necessary, and related to the claimant's work-related injury of _____. Dr. B stated that, in his opinion, it was not.

At the CCH, the claimant was questioned extensively about three prior workers' compensation claims--one in 1975, one in 1986, and one in 1992. The claimant testified that the only one of these claims that involved his neck was the one in 1975 and that these problems had long since resolved. Medical records showed that the claimant did have a herniated lumbar disc as a result of the 1992 injury. The claimant also testified that prior to his _____, injury he had never suffered from depression.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. On _____, no damage or harm occurred to Claimant's cervical spine as a result of his compensable injury from lifting a box.

3. Claimant's clinical depression, if any, was not caused by the compensable injury in that Claimant's clinical depression, if any, is the result of an ordinary disease of life.

CONCLUSION OF LAW

3. The compensable injury of _____, does not extend to clinical depression and to the cervical spine.

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. So is the question

of extent of injury. Appeal No. 93449. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

A finding of injury may be based upon the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298,299 (Tex. App.-Houston [1st Dist.] 1987, no writ). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case, the hearing officer found that the claimant's injury did not extend to depression, contrary to the testimony of the claimant and some of the medical evidence. However, there was conflicting medical evidence on this issue. While Dr. W and Dr. M relate the claimant's depression to his compensable injury, Dr. B states that it is not related. Further, Dr. B provides a rationale for his opinion, pointing to the lapse of time between the claimant's injury and symptoms as well as attributing depressive symptoms to the medication the claimant is taking. While Dr. W writes a cogent report critical of Dr. B's report, this is merely a difference of medical opinion and it was the province of the hearing officer to resolve conflicts in the evidence. We cannot say that the hearing officer was incorrect as a matter of law in how he resolved the conflicting evidence in regard to the claimant's assertion that his injury extended to depression. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Nor do we find error in the hearing officer's not requesting that Dr. B respond to Dr. W's criticisms of Dr. B's report. This was raised procedurally at the second session of the CCH in the form of a Motion for Continuance. The claimant requested a continuance so that clarification from Dr. B could be sought in light of Dr. W's report which criticized Dr. B's methodology. The hearing officer denied the Motion for Continuance stating that he had admitted Dr. W's report and would accord both it and Dr. B's report appropriate weight. On a Motion for Continuance our standard of review would be to determine whether or not

the hearing officer abused his discretion in denying the motion and under these circumstances we find no abuse of discretion.

We are far more troubled by the hearing officer's finding that the claimant suffered no injury or damage to his cervical spine as a result of the compensable injury. The claimant's detailed testimony as to his cervical injury is bolstered by his written claims of cervical injury in both the TWCC-41 and TWCC-53 as well as the medical records of both Dr. A and Dr. W. Dr. B's report does not address the issue of a cervical injury at all. Dr. O, while not assessing any impairment due to a cervical problem, does cervical testing and seems to implicitly assume that the claimant's injury includes a cervical injury. Dr. G's contention that there was no injury at all is difficult to square with the other evidence and with the positions of the parties that it was undisputed that the claimant suffered an injury.[1] Nor do we find evidence that the claimant suffered prior and subsequent injuries proof that he did not incur a cervical injury absent any contention or finding that any of these injuries constituted the sole cause of his cervical condition. *See* Texas Workers' Compensation Commission Appeal No. 94217, decided March 31, 1994; Texas Workers' Compensation Commission Appeal No. 94844, decided August 15, 1994; and Texas Workers' Compensation Commission Appeal No. 93864, decided November 10, 1993. However, the claimant had the burden to prove he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 337 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The hearing officer did not have to believe the testimony of the claimant or the medical opinion of his treating doctors. While the hearing officer does not make our review of the case any easier by providing anything beyond the most cursory of rationales for his decision, we cannot say that under our standard of review his decision is reversible. This is not the equivalent of our endorsing the decision as being the most reasonable reading of the facts. We have on numerous occasions held that the Appeals Panel should not set aside the decision of a hearing officer because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel deems most reasonable, even though the record contains evidence of inconsistent inferences. Garza, *supra*; Texas Workers' Compensation Commission Appeal No. 93334, decided June 14, 1993; Texas Workers' Compensation Commission Appeal No. 93053, decided March 1, 1993; Texas Workers' Compensation Commission Appeal No. 92539, decided November 25, 1992.

[1]We note the claimant argues that the carrier waived any right to dispute the compensability of his injury due to the fact that there was no timely dispute and the fact that the carrier has paid benefits for cervical and depression treatment for a very long period of time. The claimant made a similar argument at the CCH and the hearing officer observed that the issue of the carrier's waiver was not before him. With no issue on this matter at the CCH, we do not find that this issue is before us on appeal. We will observe the carrier never disputed at the CCH or on appeal that the claimant suffered a compensable injury on _____.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge